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IN THE

Supreme Court of The United States

OCTOBER TERM, 1979

NO. 79-967

BRYAN FLOYD,

PETITIONER

VERSUS

STATE OF ALABAMA,

RESPONDENT

BRIEF AND ARGUMENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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SUBJECT INDEX

	Page
TABLE OF CASES	ii
TABLE OF STATUTES	ii
JURISDICTION	1
OPINIONS BELOW	2
QUESTIONS PRESENTED	3
STATEMENT OF THE CASE	4
STATEMENT OF THE FACTS	4
ARGUMENT	12
CONCLUSION	18
CERTIFICATE OF SERVICE	19

Page

TABLE OF CASES

Beckwith v. United States,
425 U.S. 341, 48 L.Ed. 2d 1,
96 S.Ct. 1612 (1976). 13-14

Brewer v. Williams,
430 U.S. 387, 51 L.Ed. 2d 424,
97 S.Ct. 1232 (1977). 15-16

Ex parte: Floyd,
(S. Ct. Ala., 1979) 375 So.2d 280 2

Floyd v. State,
(Cr. App. Ala., 1978) 375 So.2d 277 2

Harris v. New York,
401 U.S. 222, 28 L.Ed. 2d 1,
91 S. Ct. 643 (1971). 13

Miranda v. Arizona,
384 U.S. 436, 16 L.Ed. 2d 694,
86 S.Ct. 1602, 10 A.L.R. 3d 374 (1966). 3,
12-15, 17

TABLE OF STATUTES

Page

28 U.S.C. 1257(3). 2

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ON PETITION FOR A WRIT OF CERTIORARI TO THE

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BRIEF AND ARGUMENT OF THE RESPONDENT IN

OPPOSITION TO THE PETITION

JURISDICTION

The decision and opinion of the Court of

Criminal Appeals of Alabama was rendered

December 19, 1978, with rehearing being denied January 16, 1979. Floyd v. State, (Cr. App. Ala., 1978) 375 So.2d 277.

The Alabama Supreme Court issued a writ of certiorari to review said decision and opinion but quashed the writ as improvidently issued on September 21, 1979. Ex Parte: Floyd, (S. Ct. Ala., 1979) 375 So. 2d 280.

The Petitioner is invoking this Honorable Court's jurisdiction under 28 U.S.C. §1257(3).

OPINIONS BELOW

The decision and opinion of the Court of Criminal Appeals of Alabama is reported as:

Floyd v. State, (Cr. App. Ala., 1978)
375 So.2d 277

The Order and opinion of the Supreme Court of Alabama is reported as:

Ex Parte: Floyd, (S. Ct. Ala., 1979)
375 So.2d 280

Both of said opinions are submitted as

appendices to the petition.

QUESTIONS PRESENTED

I.

IS A PARTY UNDER ARREST FOR PURPOSES OF THE RULE OF MIRANDA V. ARIZONA (384 U.S. 436), WHERE THE PARTY IS TAKEN TO A HOSPITAL BY AN AMBULANCE AFTER BEING FOUND UNCONSCIOUS IN A PUBLIC PLACE AND THE POLICE, ALTHOUGH PRESENT AND INVESTIGATING BOTH AT THE SCENE AND THE HOSPITAL, BRING NO CHARGES AGAINST THE PARTY AT THAT TIME?

II.

IS A POLICE OFFICER'S INQUIRY CONCERNING HIS POSSIBLE EXPOSURE TO DISEASE, SAID INQUIRY ADDRESSED TO A PRIVATE PHYSICIAN, "INTERROGATION" OF A PARTY WHO IS ALSO PRESENT AND BEING TREATED BY THE PHYSICIAN, WHERE THE PHYSICIAN IN ENDEAVORING TO DETERMINE THE DANGER TO THE OFFICER, QUESTIONS THE PARTY AND THE PARTY MAKES AN ADMISSION AGAINST HIS INTEREST?

STATEMENT OF THE CASE

The Statement of the Case contained in the Petition is substantially correct and is adopted by the Respondent State.

STATEMENT OF THE FACTS

The Court of Criminal Appeals of Alabama found the facts as follows:

> ". . .The defendant was discovered by a legal secretary shortly after 2:00 p.m., October 17, 1977, lying on the floor at the entrance of a restroom used by the occupants of the law office of Johnston & Johnston in Huntsville, Alabama.
>
> "A police officer, Ronald Adams, while patrolling in a police car in front of the building, heard

> a police dispatch about the incident. He immediately responded to the call and went to the scene. An ambulance with some medics also reported to the scene about the same time the officer arrived.
>
> "Officer Adams found the defendant lying on the floor unconscious or in a comatose state with his feet and legs inside the restroom and the rest of his body outside in the foyer adjacent to the restroom. The defendant's pants and underwear were down around his ankles. A shirt was on the floor, at or near his feet. Lying on the shirt were certain articles or items as follows: a Bic cigarette lighter, a metal teaspoon, a used hypodermic

syringe, a tie that had been tied in the shape of a tourniquet, and five cotton balls on one of which were smudges of a red substance. Also in the immediate area were a pair of sun glasses and a comb. Lying on a shirt in the same area, the officer found a 'little tinfoil pack about one inch and a half square. Inside of this tinfoil was a piece of cellophane. Inside of the cellophane was a white substance.' Officer Adams also testified that he saw 'what appeared to be needle tracks on both arms of the defendant.'

"A state toxicologist testified later in the trial that this white substance contained 86 percent

heroin.

"The medics took the defendant in their ambulance to the emergency room of a nearby hospital where a nurse promptly gave him a shot of Narcan which was an antidote for narcotics. This was about 2:35 p.m.

"The defendant's family physician, Dr. Robertson, arrived at the hospital about 2:45 p.m. to see the defendant. He testified that he saw defendant promptly; that he was awake, alert, and answered questions well. He testified that, 'he would not tell me what he had given himself, if he had.' He also testified that there was

no indication that defendant had suffered a heat stroke or heat prostration, or exhaustion. It is to be noted that defendant entered the restroom area from the roof of the building housing the restroom where he had been employed to repair the roof.

"Dr. Robertson further testified that according to his notes defendant also had 'numerous puncture wounds, both antecubital veins and with induration present.' He explained that 'the antecubital areas are these areas of both arms, and the indurations mean just firmness.'

"Officer Adams, in testifying about seeing the needle tracks on defendant's arms, also stated that the track on the left arm 'was sort of moist and had a little blood on his arm.' He further testified that 'there were more marks, but they were not fresh.'

"Mr. Thompson, the attorney who went to the scene, testified that he did not see the items that Officer Adams listed that he saw."

* * * * * * *

"It appears further in the evidence that Officer Adams, while handling the shirt in which the needle and syringe were wrapped, pricked his finger when it came in contact

with the needle's point. When the officer reached the hospital, he inquired of Dr. Robertson if there was any danger of disease or infection. Dr. Robertson replied that there was a possibility that if the needle had been used several times that Officer Adams 'could have hepatitis or something of that nature.' We quote:

"'Q. Then, what, if anything occured?

"'A. He turned around to the Defendant -

"'MR. MCDANIEL: I object.

"'THE COURT: Overruled.

"'A. And he asked the defendant if it was a new needle, if it had been used before.

"'Q. Was there a response from

this Defendant? Yes or no?

"'A. Yes.

"'MR. McDANIEL: Objection, Your Honor.

"'THE COURT: Overruled.

"'A. Yes, there was.

"'Q. What was that response?

"'A. The Defendant stated that it was a clean needle.

"'Q. Or was it clean or hadn't been used before?

"'A. He stated that it was clean and hadn't been used before.

"'Q. Did he state that or did you just infer it?

"'A. He stated it.

"'Q. All right, sir. Did you have occasion there to talk with this Defendant?

"'A. No, sir, I did not talk to him.

"'Q. Did you give him his Miranda warnings or rights?

"'A. No, sir.

"'Q. Did you charge him with any offense?

"'A. No, sir, I did not.

"'MR. MILLER: We have no other questions at this time.'

"It appears that Dr. Robertson had testified that he did not recall having any conversation with defendant 'concerning a syringe there.'" (375 So.2d 277-279)

ARGUMENT

The Petitioner argues that because there was no Miranda[1] compliance, the Petitioner's statement to his doctor was involuntary. Of course,

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[1]Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602, 10 A.L.R. 3rd 374 (1966).

failure to comply with Miranda does not render a statement involuntary. Harris v. New York, 401 U.S. 222, 28 L.Ed. 2d 1, 91 S. Ct. 643 (1971).

The Miranda Rule applies only to police interrogations of persons in custody: Miranda v. Arizona, 384 U.S. 436, 477, 16 L.Ed. 2d 694, 725, (1966).[2] It does not apply to persons who are not under arrest. Beckwith v. United States, 425 U.S. 341, 48 L.Ed. 2d 1, 96 S.Ct. 1612 (1976). And, the rule has no application to statements which are not made in response to interrogation by police. Miranda v. Arizona, 384 U.S. 436, 478, 16 L.Ed. 2d 694, 726 (1966).[3]

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[2]". . .The principles announced today deal with the protection. . .when the individual is first subjected to police interrogation. . . ." 16 L.Ed.2d 694, 725.

[3]". . .Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today. . . ." 16 L.Ed. 2d 694, 726.

In the instant case the facts stated by the Court of Criminal Appeals of Alabama and questioned by neither party show that the Petitioner was taken to a hospital in an ambulance after he was found unconscious. He was given medical treatment and no charges were made against him at that time. If the Petitioner was deprived of his freedom of movement, it was by reason of his physical condition, not any police restraints. Of co rse, the police were investigating the incident. The cir-cumstances under which the Petitioner was found were suspicious to say the least, but the facts found by the Court of Criminal Appeals clearly show that no charges were made against the Petitioner at that time. No matter how suspicious the circumstances, no matter how certain eventual prosecution may be, no rights under Miranda arise until the person is arrested. Beckwith, supra. Since the Petitioner was not under arrest at the time of this statement Miranda does not apply.

Turning to the question of whether the Petitioner was interrogated by the police, the Petitioner suggests: ". . .that any police activity which is designed to or likely to elicit a confession is 'interrogation'. . ." for the purposes of Miranda. (Petition p. 7) This definition is overbroad, since it is most difficult to say what might be likely to elicit a confession from a given arrestee. On the other hand, "interrogation" is not limited to formal questioning. Brewer v. Williams, 430 U.S. 387, 51 L.Ed.2d 424, 97 S.Ct. 1232 (1977). In Brewer this Honorable Court found that the police officer's "Christian burial" speech was interrogation, because the officer's intention was to produce a confession. Brewer v. Williams, 430 U.S. 387, 399; 51 L.Ed.2d 424, 436-437.[4] The

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[4]". . .There can be no serious doubt, either that Detective Leaming deliberately and designedly set out to elicit information from Williams just as surely as - and perhaps more effectively than - if he had formally interrogated him. . . ." 51 L.Ed. 2d 424, 436-437.

Respondent State respectfully suggests that the test of interrogation is the officer's intention in doing whatever he does which produces the confession. If the Officer's intention is to obtain admissions against interest for use as evidence, then the activity is interrogation, otherwise it is not.

Applying this test to the instant facts it is obvious that Officer Adams' intention in asking the doctor about the possibility of his having been exposed to disease was to protect his own health. Similarly, the doctor's intention was to determine the extent of a health hazard. Therefore, this was not police interrogation. The officer was obviously not concerned with obtaining evidence. The doctor, on the other hand, was acting as a medical practitioner, not an agent of the police, and his purpose was to obtain medical information. Therefore, under the standard suggested by Brewer, supra, the officer's

inquiries were not "interrogation."

If we, on the other hand, apply the Petitioner's own test (supra) to the facts, the same result is reached. Surely, Officer Adams' words were not "designed to or likely to elicit a confession." The officer's question to the doctor was designed and likely to elicit medical advice. There was no way that the officer could have known that the doctor would question the Petitioner nor what the Petitioner's response, if any, would be. The officer's action was not designed to or likely to elicit a confession. In fact, no confession was produced, only a rather mild admission against interests. Therefore, again, Miranda does not apply.

CONCLUSION

In conclusion the Respondent respectfully submits that the Petitioner was not under arrest at the time of the statement and the statement was not made in response to police interrogation. The Respondent respectfully submits that the decision and opinion of the Supreme Court of Alabama is patently correct and that the petition is due to be denied and the Respondent prays that the petition be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, one of the attorneys for the Respondent and a member of the Bar of the Supreme Court of the United States, hereby certify that on this____day of January, 1980, I did serve the requisite number of copies of the foregoing Brief in Opposition to the Petition for a Writ of Certiorari on the attorney for the Petitioner by mailing said copies to him, First Class postage prepaid, and addressed as follows:

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